88-807

Supreme Court, U.S.
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No.

IN THE SUPREME COURT
OF THE
UNITED STATES

SHARON R. CHILDS, PATRICK GILLIAM, WILLIAM KENNINGTON, SHIRLEY L. SKIRVIN, PATRICIA TORGERSON, LEONARD VELIS AND SARA-FAYE WOOD,
Petitioners,

vs.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent.

SOUTHERN CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, ERNEST J. LUCHSINGER, JACK L. SHAFFER, RODNEY P. TOMPKINS, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AND DOES 1 THROUGH 100, INCLUSIVE,
Real Parties in Interest.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Have Petitioners been deprived of access to the federal courts in violation of the due process clause by the following combination of rulings upholding the disqualification of their counsel:

(a) Richardson-Merrell, v. Koller, 472 U.S. 424 (1985) which precludes the application of the collateral order exception rule;

(b) The district court's refusal to certify the disqualification question for interlocutory appeal under 28 U.S.C. Section 1292(b) and

(c) The Ninth Circuit's refusal to find that Petitioners will not be damaged or prejudiced in a way not correctable on appeal notwithstanding clear evidence of irreparable damage.

LIST OF PARTIES

The list of parties is identical to the caption of the proceeding.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE WILLIAM REHNQUIST AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Sharon R. Childs, Patrick Gilliam, William Kennington, Shirley L. Skirvin, Patricia Torgerson, Leonard Velis, and Sara-Faye (hereinafter collectively called "Petitioners") respectfully pray that a writ of certiorari be issued to review the ruling of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 7, 1988.

OPINION BELOW

There was no opinion of the Court of Appeals. Instead, the Court of Appeals issued a Memorandum denying a petition for writ of mandamus. A copy of said Memorandum (hereinafter also called "Memo") is attached as Appendix "A" to this Petition and made a part hereof.

JURISDICTION

The Order of the Court of Appeals denying the Petition for Writ of Mandamus was entered on April 7, 1988. After the Court of Appeals granted Petitioners' Motion to Enlarge Time to File Petition For Rehearing,

Petitioners then filed two successive Petitions for Rehearing with alternate Motions to further enlarge time to file a petition for rehearing. The Court of Appeals granted two of the motions to further enlarge time but on July 21, 1988, denied Petitioners' third pleading in its entirety. Attached hereto as Appendix "B" and Appendix "C" respectively, are true and correct copies of Petitioners' Second Petition For Rehearing, or in the Alternative, Third Motion to Enlarge Time to file Petition For Rehearing, and the Court of Appeals' July 21, 1988 Order denying same. This Petition for Certiorari is being filed within 90 days of the latter date. This Court's jurisdiction is invoked under the Fifth Amendment of the United States Constitution, 28 U.S.C. Section 2201, 29 U.S.C. Sections 1001-1461, 28 U.S.C. Section 1346, 12 U.S.C. Section 1461 et seq. and 1730(k)(1), 28 U.S.C. Section 1292(b) and 28 U.S.C. Section 1651.

QUESTION PRESENTED

Have Petitioners been deprived of access to the federal courts in violation of the due process clause by the following combination of rulings upholding the disqualification of their counsel:

(a) Richardson-Merrell, v. Koller, 472 U.S. 424 (1985) which precludes the application of the collateral order exception rule;

(b) The district court's refusal to certify the disqualification question for interlocutory appeal under 28 U.S.C. Section 1292(b) and

(c) The Ninth Circuit's refusal to find that Petitioners will not be damaged or prejudiced in a way not correctable on appeal notwithstanding clear evidence of irreparable damage.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 2201; 29 U.S.C. Sec-

tions 1001-1461; 28 U.S.C. Section 1346; 12 U.S.C. Sections 1461 et seq and 1730(k)(1); 28 U.S.C. Section 1292(b) and 28 U.S.C. Section 1651.

STATEMENT OF THE CASE 1/

Petitioners were employed by Southern California Savings and Loan Association (hereinafter called "Old SoCal"), and following a takeover by the Federal Savings and Loan Insurance Corporation ("FSLIC") pursuant to the provisions of federal banking legislation (12 U.S.C. Section 1461 et seq otherwise known as the Home Owners Loan Act of 1933 or "HOLA"), continued their employment with a newly-chartered entity, Southern California Federal Savings and Loan Association (hereinafter called "New SoCal"). They were officers of the so-called "money desk program" which was a national telemarketing

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1/ References hereunder will be to the exhibits contained in the record presented in the Appendix to Petitioners' Emergency Petition For Writ of Mandamus and/or Writ of Prohibition and will show "Exh. ___" followed by appropriate page numbers.

effort involving the telephone solicitation of large certificates of deposit from investors. After the FSLIC takeover in June 1985, New SoCal eventually eliminated the money desk program and fired Petitioners from their employment.

Petitioners then filed an 8-count complaint against Old SoCal, New SoCal, FSLIC and three officers of New SoCal alleging their wrongful discharge from employment and various other pendent state tort actions including breach of implied covenant of good faith and fair dealing and intentional infliction of emotional distress.2/ Petitioners also alleged certain violations of ERISA (the Employment Retirement Income Security Act of 1974 as amended, 29 U.S.C. Sections 1001-1461) taking place between March 1985 and May 1986 (App. Exh. "C").

2/ Old SoCal and FSLIC are separately represented by counsel. The other named defendants, represented by McKenna, Conner & Cuneo are referred to either as "the New SoCal Group" or "the Real Parties In Interest".

Throughout May 1986 and into June 1987, there was substantial motion and discovery activity. The New SoCal Group filed a motion to dismiss the original complaint which was partially granted. (App. Exhs. "A" and "B") FSLIC and Old SoCal filed motions to dismiss on the grounds that Petitioners had failed to exhaust administrative remedies under HOLA and that the district court had no jurisdiction over these claims which must be adjudicated before an administrative agency. (App. Exhs. "D" and "E"). Although the district court at first granted this motion under North Mississippi Savings and Loan Association v. Hudspeth, 756 F.2d 1096 (5th Cir. 1985), cert. denied, 474 U.S. 1054, 106 S.Ct. 790 (1986) (App. Exh. "F"), following the Ninth Circuit's decision in Morrison-Knudsen Co. v. CHG International Inc., 811 F.2d 1209 (9th Cir. 1987), which disagreed with the Hudpeth decision, the district court on Petitioners' Motion for Reconsideration reversed this holding thereby reinstating

FSLIC and Old SoCal as parties defendant (App. Exh. "Q"). 3/

There has been considerable discovery. As of early 1987, all of the seven Petitioners and one of the individual defendants had been deposed. Petitioners had scheduled three other depositions for late June 1987. A set of interrogatories and a request for production of documents directed to Petitioners were pending, after well over a thousand pages of documents had already been produced. A pre-trial conference had been scheduled for June 21, 1987 and a tentative trial date was scheduled for September 1, 1987. Depositions had also been taken by New SoCal in Mobile, Alabama of three witnesses and in Cleveland, Ohio of another wit ness. The file on this case in Petitioners'

3/ On March 7, 1988, this Court decided to review the question of whether FSLIC has original jurisdiction over federal courts. Coit Independent Joint Venture v. FSLIC, 108 S.Ct. 1105 (1988).

counsel's offices by this time consisted of the equivalent of one full steel cabinet with four drawers which drawers were approximately 25 inches in length each.

At this point in time, with the trial date two and a half months away, on June 16, 1987 the New SoCal Group filed an ex parte application to disqualify Petitioners' counsel Mathews & Evans (hereinafter called "M&E") on the grounds that, while they represented Petitioners as plaintiffs in the above litigation before the district court, the firm had also been retained by Heide Domenick, an attorney formerly employed as house counsel for both Old SoCal and New SoCal but whom New SoCal discharged on or about June 2, 1987. Domenick retained M&E to seek redress for damages for her own wrongful discharge. The New SoCal Group contended Domenick had been one of two attorneys working for New SoCal in early 1986 and that she had given advice to New SoCal management respecting the employment terms and condi-

tions of Petitioners including matters involved in the ERISA violations and, more particularly, the reduction of Petitioners' pension plan accounts so that following the reduction each individual's pension account would be calculated on the basis of a $20,000.00 annual salary ceiling limitation, whereas previous to the change in April 1986, Petitioners' pensions had been calculated on the basis of their much higher annual regular salaries which were, for most Petitioners, were in excess of $100,000.00. Domenick, however, stated in a declaration filed in the district court that she had been relieved of any duties with respect to the employment terms and conditions of Petitioners in or about March 1986, at least one month before the first alleged wrongful discharges of Petitioners. Petitioners' discharges bridged a period from April 30, 1986 through July 21, 1986. (App. Exh. "P", p.2). Also, the New Socal Group contended Domenick had access to various file material pertaining to

the terms and conditions of Petitioners throughout her position as one of New SoCal's house counsel. However at no time during the ensuing motion proceedings to disqualify M&E did the New Socal Group ever point to any particular item of information whose confidentiality could or would be betrayed by Domenick to put Petitioners and M&E in a position to obtain any information from Domenick not obtainable through discovery. Domenick denied in her declaration that she had any information to offer M&E or to Petitioners.(App. Exh. "P", pp.2-5). Moreover, under Canon 4 of the Canons of Ethics, an attorney is prohibited from revealing confidential communications given or received in that person's role as an attorney to his or her client. Thus, Domenick was duty-bound to refrain from disclosing to M&E or anyone else besides her former clients the contents of any communication during the course of her attorney-client relationship with New SoCal.

Notwithstanding the New SoCal Group's failure to ever show that it had already been injured or how they could be potentially injured, following hearings on June 25 and July 2, 1987 the district court disqualified M&E from continuing to represent Petitioners and further prohibited M&E from communicating to any successor counsel information obtained from Domenick or any information obtained as a result of the firm's legal representation of Domenick (App. Exh. "T"). Thereafter, on July 21, 1987 the district court issued an Order Extending Time on Partial Summary Judgment Motion and Continuing Pre-Trial Conference which among other things extended the time for filing Petitioner's Opposition to the New SoCal Group's Second Motion for Partial Summary Judgment to August 31, 1987 and continued the pre-trial conference to October 19, 1987 at which time a new trial date would be set. (App. Exh. "U"). Since then there has been a stay of all actions except for efforts to resolve the disqualification ques-

tion.

Petitioners first approached M&E about their employment problems in March 1985, after which the firm wrote letters to Old So-Cal and New SoCal representatives, but this failed to discourage the wrongful discharges that began in early 1986. Following their discharges, on August 9, 1987, each of the Petitioners filed declarations to the effect that they knew of no lawyer who would substitute for M&E on a straight contingency fee basis and that their own financial resources had been depleted. (App. Exhs. "Z" through "AF").

After the July 7, 1987 Order disqualifying M&E, Petitioners filed an ex parte application to (1) reconsider the Court's July 7, 1987 order or, in the alternative, (2) provide immediate appeal from order granting motion to disqualify plaintiff's counsel and (3) stay all proceedings pending Petitioners' emergency appeal. (App. Exh. "V"). By Order dated August 12, 1987 the district court

denied Petitioners' ex parte application. With respect to that part of the application for certification of interlocutory appeal, the district court ruled (App. Exh. "AH):

> "(1) Petitioners have not made a sufficient showing to warrant reconsideration; and (2) It appears that review of the court-ordered disqualification by way of writ would be more appropriate than by way of interlocutory appeal."

Accordingly, on August 19, 1987, Petitioners filed their Emergency Petition for Writ of Mandamus and/or Writ of Prohibition seeking to overturn the Order disqualifying M&E. On August 28, 1987 the Court of Appeals issued an Order determining that Petitioners had raised "serious questions warranting that an answer to the petition be ordered filed." See the Order attached hereto as Appendix "D". Thereafter, following oral argument, on April 7, 1988, the Court of Appeals issued a Memorandum denying the petition. In doing so, however, the Court of Appeals never took up the ques-

tion of whether or not the July 7, 1987 Order of the District court disqualifying M&E was legal error. Instead, the Court of Appeal, pursuant to the law followed by the Ninth Circuit, first identified five specific guidelines for determining the propriety of mandamus relief as:

> "1. The party seeking the writ has no other adequate means, such as a direct appeal, to obtain the desired relief;
> 2. The petitioner will be damaged or prejudiced in a way not correctable on appeal;
> 3. The district court's order is clearly erroneous as a matter of law;
> 4. The district court's order is an oft-repeated error or one manifesting a persistent disregard of the federal rules; and
> 5. The district court's order raises new and important problems or legal issues of first impression" (App. "A").

Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977); Levine v. U.S. District Court, 764 F.2d 590, 593-594 (9th Cir. 1985), cert. denied, 106 S.Ct. 2276 (1986). The Court of Appeals further held that Petitioner "must make a strong showing of at

least the first three factors in order to persuade the court to exercise its discretion in favor of issuing the writ". (Ibid.) CBS v. United States District Court, 729 F.2d 1174, 1177-78 (9th Cir. 1983). The Court of Appeals then found that, although Petitioners met the first and fifth Bauman factors and that the fourth factor had no applicability, Petitioners failed to meet the second Bauman factor, making it unnecessary to consider the third factor which was the question of whether or not the order disqualifying M&E was erroneous as a matter of law. (App. "A", p.6). The Court of Appeals in determining whether Petitioners would be "damaged or prejudiced in a way not correctable in appeal" held that it was "not satisfied that competent substitute counsel cannot be located and although the litigation may be costly, the costs associated with even massive, multi-district litigation do not constitute irreparable injury", citing In Re Sugar Antitrust Litigation, 559 F.2d 481, 484

(9th Cir. 1977) which denied mandamus relief from an order certifying a class. (App. pp. 6-7). Because Petitioners failed to show they would "suffer irreparable harm in a way not correctable on appeal", the Court of Appeals rejected Petitioners' contention that the immense additional cost, unreasonable delay and waste, the presence of a case of extremely complex issues with the additional showing that would take a significant amount of time for Petitioners to acquaint substitute counsel with the case and Petitioners would be unable to pay any future retainers because they had lost their jobs warranted relief. Accordingly, the Court of Appeals concluded that the "propriety of the district court's disqualification order can be reviewed as effectively on appeal of a final judgment as it can on interlocutory review". Koller, supra, 472 U.S. 424, at 438.

In the interim, both Petitioners and M&E have made concerted efforts to find substitute counsel. These efforts proved to be

unsuccessful unless Petitioners pay a substantial fee as an advance retainer. Because Petitioners are still short of funds to this date they have been unable to retain any counsel, even though Petitioners have located a firm which would be otherwise willing to represent Petitioners. Nevertheless, the Court of Appeals has contined to reject Petitioners' showing and after twice continuing Petitioners' motion to enlarge time, has now denied their petition for rehearing and rejected any further enlargements of time.

REASONS FOR GRANTING THE WRIT

1. IT IS CLEAR NOW THAT THE DISTRICT COURT'S ERROR IS NOT CORRECTABLE BY WAITING UNTIL THE COURSE OF A NORMAL APPEAL

With no prospect that they can employ substitute counsel, the combination of rulings now requires Petitioners to wait until they have been defeated in pro se in district court before they are able to take up the issue concerning the M&E disqualification. Clearly, a normal appeal is inadequate

at this point, and every one of the three possible avenues of appeal short of a normal final appeal that may have been available to Petitioners have been denied. These three possible avenues were (1) to obtain a direct appeal under the "collateral order doctrine", (2) to obtain an order certifying an interlocutory appeal or (3) to obtain review under the All Writs Statute (28 U.S.C. 1621).

Until 1985, the first avenue was available under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949) where orders not yet final involved rights "to important to be denied review and too independent of the cause itself" to wait until final adjudication. This avanue is no longer available since Richardson-Merrell, Inc. v. Koller, supra.

The second avanue of obtaining an interlocutory order for appeal was blocked by the district court's holding that proceeding under the All Writs Statute "would be more appropriate than by way of interlocutory ap-

peal." (App. Exh. "AH"). The Koller case mant to soften the blow resulting from the abandonment of the collateral order exception by holding that a client or disqualified attorney would not be left "without a remedy" and, as noted previously its forerunner decision in Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 377-378 (1981), could "seek to have the question certified for interlocutory appeal". (105 S.Ct. at 2763). This may result if the district court "shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. Section 1292(b). However, the district court's August 12, 1987, denial of Petitioners' motion ignored this section entirely thereby leading to the filing for the writ of mandamus. the district court's order of August 12, 1987 is also at odds with the

Court of Appeals August 28, 1987, panel. Order determining that Petitioners had raised "serious questions warranting that an answer to the petition be ordered filed." 4/

The third and last avenue of preceeding under the All Writs Statute is now not available in view of the Court of Appeals' determination that there is no showing of irreparable hardship and that the propriety of M&E's disqualification order may be reviewed "as effectively on appeal of a final judgment as it can on interlocutory review", even though Petitioners must now face opposing parties on their own.

Real Parties In Interest never made an affirmative showing that any confidential information had leaked from Domenick to M&E so as to injure them. Instead, they relied on a presumption of irregularity that some dis-

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4/ The panel consisted of Ninth Circuit Judges Browning, Kennedy and Leavy. See Appendix "D".

closure must inevitably take place because (1) Domenick had at one time advised her former clients on employment and personnel matters and (2) until her June 1987 discharge Domenick had access to confidential corporate files in New SoCal's office pertaining to Petitioners' litigation against Real Parties In Interest. This position was legally untenable. The only occasions in which courts applied the presumption of irregularity to disqualify counsel occurred either where (1) an attorney had provided prior representation to a former client whom he now intended to sue in a later case or (2) in the absence of prior representation, there was a substantial relationship between the litigation formerly handled by the attorney in question and the new or proposed litigation.

With respect to the prior representation queestion, in Trone v. Smith, 621 F.2d 994 (9th Cir. 1980) there was no particular showing of a breach of confidence. Nevertheless,

there was a clear potential for a conflict so that the court had to avoid the appearance of an impropriety under Canon 4. An attorney was hired by a client to evaluate the circumstances for the latter's offering shares of stock to a brokerage firm. The attorney performed extensive work for the client in the capacity of general counsel to the client's trustees. After the extensive investigation of the client's affairs had been completed, the attorney switched sides to represent a group of individuals seeking millions of dollars in compensatory and punitive damages for breach of fiduciary duties against the same individuals by whom the attorney had been retained. Even though no showing of a breach of confidence was evident, the attorney was disqualified because of his "prior representations" of the client. M&E never represented any of the real parties in interest and were obviously in no position to make any investigation into New SoCal's confidential affairs as their former counsel.

With respect to the second or "substantial relationship" test, Real Parties In Interest relied on Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975). There the court disqualified counsel who had engaged the services of one who had sued Celanese for sex discrimination. The disqualification resulted for good cause, because the Celanese house attorney had worked on the initial sex discrimination case and consulted with management. Thereafter, when she decided that she too was a victim of the same policy, she moved to intervene in the proceeding on which she had been working for Celanese. A disqualification order was appropriate to avoid the appearance of an propriety because there was a clear "substantial relationship" in that the attorney had attempted to intervene in the same case. This order disqualified the attorney who had originally filed the sex discrimination complaint even though there had never been prior representation on his part of Celanese.

Neither element was present here. Not only was there no prior representation on the part of M&E but also there was no substantial relation between the matters on which Domenick performed legal services and the wrongful discharges of Petitioners. At the most it was only a "peripheral involvement" on Domenick's part in Petitioners' case which was not enough. Silver Chrysler-Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975); Gas-A-Tron of Arizona v. Union Oil Co. of California, 534 F.2d 1322 (9th Cir. 1976), cert. denied, 429 U.S. 861 (1976).

The upshot of the dilemma facing Petitioners is that without some way of obtaining review of the disqualification order and without counsel to act for them, they have effectively been deprived of access to the courts because they have been deprived by a combination of the rulings against them of access to the courts. And the deprivation

of counsel of their choice is particularly severe in view of the low esteem attempts to disqualify counsel normally present. Disqualification orders are not favored in the law to begin with in view of the strategic reasons to use them as a tactical device to delay litigation. See Laker Airways, Ltd. v. Pan American Airways, 103 F.R.D. 22 (D.D.C. 1984); River West, Inc. v. Nickel, 188 Cal. App. 3d 1297, 234 Cal.Rptr. 33 (1987).

2. THE BLOCKING OF ALL AVAILABLE AVENUES TO AN INTERLOCUTORY APPEAL ON THE DISQUALIFICATION VIOLATES PETITIONERS' RIGHTS TO PROCEDURAL DUE PROCESS

The Fifth Amendment of the United States Constitution provides:

> "No person shall be...deprived of life, liberty, or property, without due process of law;..."

Deprivation of counsel in a civil case was the subject of a historical treatment in Potashnick v. Port City Construction Co., 609 F.2d 1101, 1117-1120 (5th Cir. 1980).

Potashnick held, inter alia, that litigants in civil cases have the right to retain counsel implicit in the concept of Fifth Amendment due process, as a parallel right to a criminal defendant's right to counsel which arises out of the Sixth Amendment. Although there is little authority dealing with the existence of this right (see footnote 11 in Potashnick, 609 F.2d at 1117) because the English judicial system always recognized the right to retain civil counsel, this Court has upheld the right:

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense (emphasis added)"

Powell v. Alabama, 287 U.S. 45, 68-69 (1932). See other cases cited at 609 F.2d at 1118. See also Mosley v. St. Louis South Western Railway, 634 F.2d 942, 945-946 (7th Cir. 1981) involving an EEOC administrative

proceeding which also holds that the "right of access to counsel is one of constitutional dimensions and should be freely exercised without impingement" in a non criminal case.

Because the combination of the three above rulings places Petitioners in a hopeless trap in which they can retain neither counsel because one has been disqualified and the other requires payment of funds they simply do not have, they have been deprived of their access to the courts. For these reasons, they have been deprived of their rights under the Fifth Amendment.

CONCLUSION

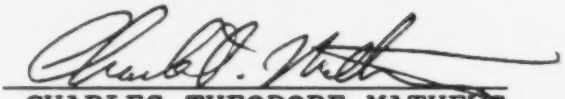
For all the above reasons, Petitioners have been deprived of their procedural due process rights under the fifth Amendment. The only way to protect these rights is to frame an order which will permit the Court of Appeals to review the correctness at law of the district court's order disqualifying M&E. The action should not be permitted to proceed while Petitioners are deprived of their

access to the courts unless or until this question is fully reviewed at law. In the alternative, the Court should do one of three things to insure this review: Either it must (1) overrule the Koller case and permit the collateral order exception rule, (2) order that the matter be certified for an interlocutory appeal under 1292(b) or (3) reverse the Court of Appeals' determination that Petitioners have been damaged in a way not correctable on appeal because they could not show irreparable damage, when in fact it is clear that they have been irreparably damaged. Another possible alternative would be to remand the question of whether irreparable damage has in fact occurred and whether the second Bauman factor has been satisfied so as to enable a review of the correctness of the disqualification order. In order to insure a full and complete legal review of the correctness of the disqualification order, the Court is respectfully urged to grant Petitioners' Petition

for Writ of Certiorari.

Dated at Los Angeles, California this 18th day of October, 1988.

Respectfully Submitted:
SHARON R. CHILDS, PATRICK GILLIAM, WILLIAM KENNINGTON, SHIRLEY L. SKIRVIN, PATRICIA TORGERSON, LEONARD VELIS AND SARA-FAYE WOOD

By: 
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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS OURT

FOR THE NINTH CIRCUIT

SHARON R. CHILDS; PATRICK GILLIAM; WILLIAM KENNINGTON; SHIRLEY L. SKIRVIN; PATRICIA TORGERSON; LEONARD VELIS; SARA-FAYE WOOD,	)	
Petitioners,	)	
vs.	)	NO. 87-7365
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA;	)	D.C.NO. CV-86-2879 (RMT(Gx))
	)	MEMORANDUM*
Respondent	)	
SOUTHERN CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION; ERNEST J. LUCHSINGER; JACK L. SHAFFER; RODNEY P. TOMPKINS; FEDERAL SAVINGS AND LOAN INSURANCE CORP., and DOES 1 through 100, inclusive,	)	
Real Parties In Interest	)	

– APPENDIX "A" –

Petition for Writ of Mandamus

Argued and Submitted November 5, 1987, Pasadena, California

Before: ALARCON AND NELSON, Circuit Judges, and ROSENBLATT, ** District Judge

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by ninth Circuit Rule 36-3.
** Honorable Paul G. Rosenblatt, United States District Judge for the district of Arizona, sitting by designation.

Sharon R. Childs, Patrick Gilliam, William Kennington, Shirley L. Skirvin, Patricia Torgerson, Leonard Velis, and Sara-Faye wood ("the petitioners") seek a writ of mandamus directing the district court to vacate its order granting the motion of Southern California Federal Savings and Loan Association, Ernest J. Luchsinger, Jack L. Shaffer and Rodney P. Tompkins to disqualify the petitioners' counsel, Mathews & Evans. The action is still pending in district court and has not yet been tried. The district court granted the motion to disqualify the

petitioners' counsel on the ground that Mathews & Evans had been retained by Heide Domenick, a former attorney for both Southern California Savings and Loan ("Old SoCal") and Southern California Federal Savings and loan Association ("New SoCal"), in connection with her own discharge. The petitioners contend that their petition for writ of mandamus should be granted because they have no other means to obtain relief from the district court's order, the order damages them in a way not correctable on appeal, the order raises an issue of first impression, and the district court's order was clearly erroneous as a matter of law.

FACTS

The petitioners, represented by the firm of Mathews & Evans, sued their former employer, Southern California Federal Savings and Loan Association ("New SoCal") and New Socal's predecessor, Southern California Savings and Loan Association ("Old SoCal"), as well as the Federal Savings and Loan In-

surance Corporation ("FSLIC"), Ernest J. Luchsinger, Jack L. Shaffer, and Rodney P. Tompkins 1/ for wrongful discharge, violations of ERISA, breach of the implied covenant of good faith and fair dealing, and intentional infliction of emotional distress.

The petitioners were all officers of Old SoCal's "Money Desk" program, a national telemarketing program involving the telephone solicitation of large certificates of deposit from clients who had not previously done business with Old SoCal. In June 1985, the FSLIC declared Old SoCal insolvent and closed the institution. The FSLIC then transferred the assets and liabilities of Old SoCal to a newly-created federal savings and loan association, New SoCal, and the petitioners became employees of New Socal. New SoCal gradually phased out the "Money Desk" program, and eventually eliminated the program entirely.

1/ Luchsinger and Shaffer were officers of both Old SoCal; Tompkins was an officer of New SoCal.

On June 6, 1987, New SoCal, Luchsinger, Shaffer and Tompkins filed a motion for an order disqualifying the law firm of Mathews & Evans from continued representation of the petitioners because the firm had also been retained by Heide Domenick, a former attorney for both Old SoCal and New SoCal, in connection with her own discharge. The district court granted the motion disqualifying Mathews & Evans from continued representation of the petitioners and prohibited the firm from communicating to successor counsel any information obtained from Heide Domenick or any information obtained as a result of the firm's legal representation of Domenick. On August 3, 1987, the petitioners moved for reconsideration of the district court's disqualification order. The district court denied the motion and refused to certify the order for interlocutory appeal under 28 U.S.C. Section 1291(b); instead, the court suggested that the petitioners seek review of its order by way of a writ of mandamus. On

August 20, 1987, the petitioners filed an emergency petition for writ of mandamus. A motions panel of this court stayed the district court proceedings pending disposition of the petition.

ANALYSIS

I

Standard of Review and Applicable Law

Mandamus is generally considered a drastic remedy, to be invoked only in exceptional or extraordinary circumstances. See Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976). Normally, the writ issues only where the district court has exceeded its jurisdiction, or has taken other actions amounting to a judicial usurpation of power. See Guerra v. Board of Trustees, 567 F.2d 352, 353-54 (9th Cir. 1977).

In Bauman v. United States Dist. Court, 557 F.2d 650(9th Cir. 1977), this court identified five specific guidelines for determining the propriety of mandamus relief in a particular case:

1. The party seeking the writ has no other adequate means, such as a direct appeal, to obtain the desired relief;

2. The petitioner will be damages or prejudiced in a way not correctable on appeal;

3. The district court's order is clearly erroneous as a matter of law;

4. The district court's order is an oft-repeated error or one manifesting a persistent disregard of the federal rules; and

5. The district court's order raises new and important problems or legal issues of first impression.

Id. at 654-55. This court reaffirmed the Bauman guildlines in Levine v. U.S. Dist. Court for Cent. Dist. of Cal., 764 F.2d 590, 593-94 (9th Cir. 1985), cert. denied, 106 S.Ct. 2276 1986).

Although satisfaction of all the factors is not required, Valley Broadcasting Co. v. United States Dist. Court, 798 F.2d 1289, 1292 n.3 (9th Cir. 1986), the petitioner must

make a strong showing of at least the first three factors in order to persuade the court to exercise its discretion in favor of issuing the writ. C.B.S. v. United States Dist. Ct. for Cent. Dist. of California, 729 F.2d 1174, 1177-78 (9th Cir. 1983). In Levine, the court held that even where application of the first two Bauman guidelines supports an exercise of mandamus jurisdiction, a simple showing of error will not satisfy the third guideline. See Levine, 764 F.2d at 594. The burden is on the petitioner to show a clear and indisputable right to mandamus relief. See In re Cement Antitrust Litigation (MDL No. 296), 688 F.2d 1297, 1305 n.5 (9th Cir. 1982), aff'd for lack of a quorum, 459 U.S. 1191 (1983).

II.

MERITS

Petitioners contend that the petition for mandamus should be granted because they have met the first, second, third and fifth Bauman factors. This Court concludes that

petitioners have met the first and fifth Bauman factors, and that the fourth factor has no applicability. However, because the petitioners have not met the second Bauman factor, the petition must be denied, and therefore it is not necessary for the Court to consider the third factor.

The petitioners have not demonstrated that they will suffer irreparable injury absent mandamus relief.

They contend damage will be incurred in additional cost, unreasonable delay and waste for the following reasons: the issues presented in the case are extremely complex and it would be difficult or impossible to locate competent substitute counsel; most of the work has been completed and it would take a significant amount of time for the petitioners to acquaint substitute counsel with their case; present counsel may face motions to disqualify in related court proceedings in California; and petitioners will be unable to pay future retainers because they

have lost their jobs and thus will be unable to continue the litigation unless substitute counsel would be willing to work for a straight contingency.

The Court is not satisfied that competent substitute counsel cannot be located and although the litigation may be costly, the costs associated with even massive, multi-district litigation do not constitute irreparable injury. See In re Sugar Antitrust Litigation, 559 F.2d 481, 484 (9th Cir. 1977) (denying mandamus relief from an order certifying class). The fact that any error in the district court's order may cause hardship from delay and the additional expenditure of judicial and private resources likewise does not justify mandamus relief. See Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964); Bauman, 557 F.2d at 657. The propriety of the district court's disqualification order can be reviewed as effectively on appeal of a final judgment as it can on interlocutory review. See Richardson-

Merrell, Inc. v. Koller, 472 U.S., 424, 438 1985).

The petitioners having failed to show that they will suffer irreparable harm in a way not correctable on appeal, the petition for writ of mandamus is denied.

No. 87-7365
(USDC No. CV-86-2879-RMT(Gx)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHARON R. CHILDS; PATRICK GILLIAM; WILLIAM KENNINGTON; SHIRLEY L. SKIRVIN; PATRICIA TORGERSON; LEONARD VELIS; SARA-FAYE WOOD,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

and

SOUTHERN CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, SOUTHERN CALIFORNIA SAVINGS AND LOAN ASSOCIATION; FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION; ERNEST J. LUCHSINGER; JACK L. SHAFFER; RODNEY P. TOMPKINS; and DOES 1 through 100, inclusive,

Real Parties In Interest.

SECOND PETITION FOR REHEARING OR, IN THE ALTERNATIVE, THIRD MOTION TO ENLARGE TIME TO FILE PETITION FOR REHEARING ON EMERGENCY PETITION FOR WRIT OF MANDAMUS

WILLIAM D. EVANS
3660 Wilshire Blvd. PH O
Los Angeles, Ca 90010

COMES NOW Petitioners and hereby urge the Court to either (1) grant this Petition For Rehearing or (2) further enlarge the time for filing a Petition For Rehearing to and including July 29, 1988.

INTRODUCTORY STATEMENT OF PETITION FOR REHEARING

The Petition For Rehearing should be granted because the Court overlooked important material facts in its decision. In the first place, Petitioners made an adequate showing of irreparable harm. Even though the Court disagreed, subsequent events bear out the accuracy of Petitioners' prediction. Accordingly, the Court should now consider the question of whether or not the Motion for Disqualification was correctly decided by the federal district court, find that the second quideline for mandamus relief said forth in Bauman v. United States District Court, 557 F.2d 650, 654-55 (9th Cir. 1977) has been adequately shown and proceed to determine whether the third element (is the District

Court's order clearly erroneous?) has been satisfied.

On April 7, 1988, this Court denied Petitioners' Petition For Writ of Mandate seeking to reverse Respondent Court's July 7, 1987 Order Granting Disqualification of the undersigned counsel of Petitioners. Petitioners contend that said Order was clearly erroneous as a matter of law. The Court's April 7, 1988 decision did not decide that particular question because there was an insufficient showing that Petitioners would be "damaged or prejudiced in a way not correctable on appeal". Page 5 of the Court's Memorandum; Bauman v. United States District Court, supra. More particularly, the Court determined the Petitioners could not then show irreparable harm. Petitioners contended that it would be difficult or impossible to find competent substitute counsel, however, the Ninth Circuit held "the Court is not satisfied that competent substitute counsel cannot be located". Page 7 of the April 7,

1988 memorandum.

This was the setting when Petitioners' attorneys petitioned this Court on May 26, 1988 (see Declaration of William D. Evans) to show that, notwithstanding a long and tedious search by both clients and disqualified attorneys, no counsel had indicated to the undersigned that he or she would substitute. On the basis of this Declaration, the undersigned asked for and received a second enlargement of time in which to file a Petition For Rehearing as an alternative relief to a Petition For Rehearing in the event that the Motion to Enlarge was not granted a second time. Since then, one of our clients who purports to act as a representative of all seven Plaintiffs has instructed the undersigned to cease looking for other substitute counsel. On the other hand, through our clients' efforts, no substitute counsel to date has been identified nor have they communicated with this firm to familiarize themselves with the file generated in this case

to date so that, whatever the status is with respect to clients attempts to retain substitute counsel, those efforts have not yet been successful. All of this establishes clearly that irreparable damage has been shown. The case herein has not progressed further and has bene suspended for almost one year because of these proceedings.

LEGAL ARGUMENT

I.

NO SUBSTITUTE COUNSEL CAN BE LOCATED

Following 6 weeks of searching up through the end of May 1988, Petitioners have evidently been unable to find any substitute counsel to this time. This reinforces the undersigned's prediction about the fact that irreparable damage has bene proven and, even if it was not proven to the satisfaction of the Court during the oral argument in November 1987, it has clearly been established by now. There is no reason to think that Petitioners will be any more successful now where they have intensively searched for al-

most three months and have been unable to make necessary arrangements with substitute counsel. On this basis there is clearly more than ever a showing that the second Bauman factor has been demonstrated and that Petitioners' position is not correctable on appeal.

II.

THE DISTRICT COURT'S DISQUALIFYING COUNSEL WAS CLEARLY ERRONEOUS

The Court did not treat that part of the document filed on May 27, 1988 as a Petition For Rehearing but only on the alternative basis as a Motion to further enlarge time to file a Petition for Rehearing. Obviously, the undersigned is aware that the Court may not continue this period indefinitely, but instead it should now determine that the July 7, 1987 Order was legally incorrect. For reasons already stated in the Petition and Reply to Opposition, Petitioners urge the Court to reverse the District Court which erroneously disqualified this firm by applying

a presumption of irregularity without any actual showing of a breach of confidence or conflict of interest notwithstanding that no such application of an appearance of impropriety rule had ever been made before without a showing of either (1) prior representation of the moving client by the firm sought to be disqualified or (2) a substantial relationship between the two sets of litigation. (1) There was never any prior representation by Mathews & Evans of any of the Defendants as there was in Trone v. Smith, 621 F.2d 994 (9th Cir. 1980). (2) there was no showing of any connection between Domenick's June 1987 discharge and Petitioner's April through July 1986 discharges so as to invoke the application of Hull v. Celanese Corp, 513 F.2d 568 (2d Cir. 1975) on which Real Parties In Interest strongly relied in their arguments. Accordingly, Petitioner's request that the Court now rule on this Petition For Rehearing at this time and reverse the erroneous July 7,

1987 Order of the Federal District Court.

III.

IF PETITIONERS ARE STILL IN NO POSITION TO MAKE A SHOWING OF IRREPARABLE HARM, THEN A FURTHER ENLARGEMENT OF TIME SHOULD BE GRANTED

As indicated above, there have already been two motions to enlarge the time which have been granted to allow proper time to search for substitute counsel. Both this firm and Petitioners have intensively searched for substitute counsel. Now one of Petitioners has instructed this firm to cease their efforts. Although Petitioners are still looking for substitute counsel, no one has been retained. While our firm contends below that enough time has elapsed for this purpose and that this should not be considered indefinitely so that the Court should go on to the rule on the Petition For Rehearing on the basis that the third Bauman step has been satisfied, nevertheless if the Court still believes irreparable damage has not

been shown, then Petitioners have no alternative except to seek still another enlargement in which to have its Petition For Rehearing considered, through July 29, 1988.

Dated at Los Angeles, California this 24th day of July 1988.

Respectfully Submitted:
SHARON R. CHILDS, et al.

By:_____
WILLIAM D. EVANS
MATHEWS & EVANS
Attorneys for Petitioners

SUPPLEMENTAL DECLARATION OF WILLIAM D. EVANS

I, WILLIAM D. EVANS, declare:

(1) I am an attorney of record for Plaintiffs and Petitioners in the above case.

(2) Since our previous May 27, 1988, filing, our office has not searched for substitute counsel any further because one of Petitioners asked us not to do so and indicated Petitioners had found substitute counsel.

(3) Notwithstanding the latter statement in Paragraph 2 above, no attorneys have contacted this office to inspect the considerable file already generated in this proceeding, leading this office to conclude that satisfactory arrangements between Petitioners and any new attorneys have not been finalized. This would also demonstrate that such satisfactory arrangements may never be made.

(4) Even though this firm has been disqualified, subject to these proceedings, this firm feels it still has an obligation to ex-

haust its attempts to keep the proceeding alive for Petitioners and to protect their interests in the event that they are unable to conclude arrangements with any new counsel and they are forced to proceed pro se.

I swear under penalty of perjury under the laws of the State of California that the above statements are true and correct.

Dated at Los Angeles, California, this 24th day of June 1988.

_____

WILLIAM D. EVANS

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 3660 Wilshire boulevard, Penthouse "O", Los Angeles, California, 90010.

On June 24, 1988 I served the foregoing document described as SECOND PETITION FOR REHEARING OR, IN THE ALTERNATIVE THIRD MOTION TO ENLARGE TIME TO FILE PETITION FOR REHEARING ON EMERGENCY PETITION FOR WRIT OF MANDAMUS on the interested parties in this action

XXX by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached list:
___ by placing ___ the original ___ a true copy thereof enclosed in sealed envelopés addresssed as follows:

SEE ATTACHED LIST

XXX *(By Mail) I am familiar with the regular mail collection and processing practives of said business, and in the ordinary course of business, the mail is deposited with the United States Postal Service that same day.
I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

___ **(By Personal Service) I delivered such envelope by hand to the offices of the addressee.

___ (State) I declare under penalty of perjury undre the laws of the State of California that the above is true and correct.

___ (Federal) I declare that I am employed in

the office of a member of the bar of this court at whose direction the srevice was made.

Executed on June 26, 1988, at Los Angeles, California.

SHARON PETERSON _____
Type or Print Name Signature

* (By mail sugnature must be of person depositing envelope in mail slot, box, or bag)
** (For personal service signature must be that of messenger)

UNITED STATES DISTRICT COURT
JUDGE TAKASUGI
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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHARON R. CHILDS; PATRICK GILLIAM; WILLIAM KENNINGTON; SHIRLEY L. SKIRVIN; PATRICIA TORGERSON; LEONARD VELIS; SARA-FAYE WOOD, Petitioners, V. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA; Respondent, SOUTHERN CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION; ERNEST J. LUCHSINGER, JACK L. SHAFFER, RODNEY P. TOMPKINS, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AND DOES 1 THROUGH 100 inclusive, Real Parties In Interest.	NO. 87-7365 D.C.NO. CV-86-2879 RMT(Gx) ORDER

Petition for Writ of Mandamus

Argued and Submitted November 5, 1987

Pasadena, California

Before: ALARCON and NELSON, Circuit Judges,

and ROSENBLATT,* District Judge

The Second Petitioner for Rehearing or, in the Alternative, Third Motion to Enlarge Time to file Petition for Rehearing on Emergency Petition for Writ of Mandamus is denied.

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*Honorable Paul G. Rosenblatt, United States District Judge for the District of Arizona, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHARON R. CHILDS, et al.,	No. 87-7365
Petitioners,	DC:CV-86-2879-RMT Central California
v.	ORDER
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, and SOUTHERN CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, ERNEST J. LUCHSINGER, JACK L. SHAFFER, RODNEY P. TOMPKINS, FEDERAL SAVINGS INSURANCE CORPORATION, AND DOES 1 THROUGH 100, inclusive,	
Real Parties In Interest	

Before: BROWNING, KENNEDY AND LEAVY, Circuit Judges

The panel has determined that the petition for a writ of mandamus raises serious questions warranting that an answer to the petition be ordered filed. Fed. R. App. P. 21(b). Within 14 days from entry of this or-

der, the real parties in interest shall answer the petition. Proceedings in the district court are hereby stayed pending disposition of the petition for a writ.

The Clerk shall schedule this matter for argument on a regular calendar of the court in October, 1987 or as soon thereafter as is practicable.

DECLARATION OF WILLIAM D. EVANS

I, WILLIAM D. EVANS, declare:

1. I am an attorney at law admitted to practice in all state and federal courts in the State of California and have served as co-counsel to my partner Charles Theodore Mathews in proceedings entitled Sharon R. Childs, et al v. Southern California Federal Savings and Loan Association, et al, in the United States District Court, Central District of California, Case No. CV-86-2879-RMT (Gx) and Sharon R. Childs et al. v. United States District Court for the Central District of California, et al., in the United States Court of Appeals for the Ninth Circuit, Case No. 87-7365.

2. At no time since the July 7, 1987, disqualification order of the firm of Mathews & Evans has any attorney or firm of attorneys ever communicated with us to inform us that they have been retained by Petitioners to

take over the prosecution of their case.

3. From conversations I have had with Petitioners since that time, the latest of which are telephone conversations with Patrick Gilliam on October 17 and 18, 1988, I have been informed that, while Petitioners have attempted to retain other attorneys to continue with the case, and have contacted prospects they have been unable to pay the retainers other attorneys require because they do not have the funds to pay them.

I declare under penalty of perjury under the laws of the State of California that the statements above are true and correct.

Dated at Los Angeles, California, this 18th day of October, 1988.

_____

WILLIAM D. EVANS

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is 3660 Wilshire Boulevard Penthouse "O", Los Angeles, California.

On November 15, 1988, I served the within Petition for Writ of Certiorari in re: "Sharon R. Childs, et al. v. United States District Court for the Central District of California, el al." in the United States Supreme Court, October Term 1988, No.....'

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California addressed as follows:

G. Howden Fraser, Esq.
Wendy Marshall Hughes
444 South Flower Street
Los angeles, CA 90071

Gail M. Robillard, Esq.
Malley, Scott, Koffman, et al.
2600 Colorado Avenue
Suite 400
Santa Monica, CA 90404

Douglas D. Voiles
Petitt & Martin
355 S. Grand Avenue
Los Angeles, CA 90071

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 15, 1988, at Los Angeles, California.

SHARON PETERSON